Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	
the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

To: The Commission

COMMENTS OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

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SUMMARY

An open video system ("OVS") is one of four options for a local exchange carrier ("LEC") to provide video programming to subscribers. Thus, the OVS rules cannot be meant simply to give the LECs the "flexibility" to compete with cable operators. The LECs can do that by becoming cable operators themselves. Rather, OVS must be distinctly different than a cable system: an open, non-discriminatory access system, not a cynical vehicle for achieving the perceived benefits of being a cable operator while avoiding the obligations Congress left intact under Title VI.

These comments address four key principles:

(1) The Commission Must Adopt Strong Nondiscrimination Rules. The statute requires FCC rules that prohibit an OVS operator from discriminating among video programming providers, and that ensure just, reasonable, and nondiscriminatory rates, terms, and conditions for carriage. An OVS in which the operator could discriminate among programmers would simply be cable under another name. The NPRM is simply wrong in suggesting that the OVS rules should allow for some "discrimination." On the contrary, the OVS rules must affirmatively ensure nondiscrimination, rather than waiting for complaints from programmers that have already been harmed. In particular, the 2/3 capacity requirement should apply not only to OVS as a whole, but also separately to both analog and digital portions. Channel positioning rules must also be nondiscriminatory.

Publicly-posted, uniform rates are the only reliable means of enforcing reasonable and non-discriminatory rates. In place of tariffing, we suggest that OVS operators must make all carriage contracts publicly available. Moreover, the OVS operator must justify any differences in the rates charged for carriage (including rates to affiliates) by verifiable and objective factors, such as special rates for PEG programmers, or volume discounts. All OVS programming contracts should contain a "most favored nations" clause.

To ensure reasonable carriage rates, any programming affiliate of the OVS operator must file standalone financial statements. In addition, as a "reality check," rates should be presumed unreasonable unless (1) at least 1/3 of system capacity is occupied by independent programmers; and (2) at least four such programmers are on the system. The OVS operator's relationship with any such programmer should be restricted to a "carrier-user" relationship.

An OVS operator should not be allowed to manage channel allocation. If initial demand exceeds system capacity, a proportional allocation appears best. But a one-time allocation that is frozen for years would be unacceptable. An OVS operator not fulfilling the 2/3 set-aside requirement should cede capacity to any requesting party within 30 days. Free trading and subleasing of capacity by unaffiliated programmers should be allowed. To prevent discrimination, an OVS operator may not market other programmers' channels, or choose what programming is

carried on shared channels; impose unnecessary financial hurdles on programmers; or favor its affiliates over other programmers.

If an OVS operator is found to be in violation of the OVS rules, it should be decertified and required to obtain cable franchises for the relevant areas.

(2) Open Video Systems Should Meet PEG Obligations Through a "Match or Negotiate" Requirement. Congress recognized that OVS must meet local PEG needs and interests and that local governments have unique expertise in ascertaining those needs and interests. Thus, an OVS operator should be subject to a "match or negotiate" requirement: it may choose either to match each incumbent cable operator's PEG obligations, or to negotiate agreements acceptable to the affected communities. In either case, the OVS operator's certification should include an endorsement by the local government of its PEG requirements.

If an OVS operator chooses to match the cable operator, it must also match any future changes in PEG obligations. These conditions extend to PEG and I-net facilities as well as capacity. The matching obligation of an OVS operator must be cumulative with the PEG obligations of the cable operator.

Under the "negotiate" option, the franchising authority and the OVS operator may negotiate PEG obligations that provide an equivalent benefit to the community, with equivalent burdens on the two operators. In any areas where no cable operator is authorized to serve, the OVS operator must negotiate with the local government.

The Commission should reject any proposals to average or "federalize" OVS PEG obligations. PEG requirements must be based on the particular needs and interests of each local community. Thus, where an OVS will overlap several franchise areas, it should be designed with the capability to fulfill the separate PEG requirements of each affected community. PEG channels should be provided to all subscribers. If special equipment is necessary to have PEG programming distributed over the OVS, the OVS operator must provide that equipment.

The 'fee in lieu of franchise fees' paid by an OVS operator must be matched to the local cable operator's obligations.

(3) Cable Operators Should Not Be Permitted to Become OVS Operators, But If They Are, Separate and Prior Local Approval Will Be Necessary. The statute makes clear that only a LEC may be an OVS operator. A cable operator may provide programming through an OVS, but only if consistent with its cable franchise and the public interest. In any case, a cable system cannot become an OVS without prior local community approval. A cable operator's only right to be in the public rights-of-way comes from its cable franchise. If a cable operator could unilaterally abrogate the local government's contractual rights under that franchise agreement, that would be a taking of the local government's property rights under contract.

(4) The Certification Process Must Ensure That An OVS Complies With Local Rights Regarding the Public Rights-of-Way. OVS rules must acknowledge local governments' property interests

in the public rights-of-way. Thus, a certification must show that the prospective OVS operator has obtained all necessary local consents to use of the rights-of-way for OVS. Any suggestion in the OVS rules that the Commission's approval makes local approval unnecessary would be a "taking" within the meaning of the Fifth Amendment, subject to the constitutional requirement of just compensation. Neither the OVS provisions of the 1996 Act, nor the legislative history, gives the Commission any authority to effect a taking of local government property. Nor would the "fee in lieu of franchise fees" provide just compensation for such a taking.

No past grant of authority to a LEC could be construed to include a right to use the rights-of-way for OVS, which is not telephone service and which did not exist at the time of such grants. A prospective OVS operator must be required to show that it has obtained the authorizations necessary under state and local law to use local public rights-of-way for OVS.

The short review period for OVS certification approval means that a prospective OVS operator must be required to prove that it has obtained local authority to use rights-of-way and fulfilled its PEG obligations before certification. Facial approval subject to later review is unacceptable.

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To: The Commission

The National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, by their attorneys, and, where appropriate, on behalf of their members, hereby file the following comments in response to the Report and Order and Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released March 11, 1996. These joint commenters have combined their comments in response

to the Commission's request that filings be streamlined and consolidated wherever possible.

I. INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act" or "Act") repeals the former telco-cable cross-ownership ban by providing not one, but four options for a local exchange carrier ("LEC") that wishes to provide video programming to subscribers. A LEC may:

(1) provide video programming using radio transmission under Title III of the Communications Act of 1934 ("Communications Act");

(2) provide transmission on a common carrier basis under Title II of the Communications Act;

(3) be a cable operator under Title VI of the Communications Act; or

(4) operate an "open video system" ("OVS") under new § 653.[1]

The fourth option, OVS, is a hybrid model. Particularly when viewed in light of the other three options, OVS is best viewed as a hybrid between the common carrier option and the cable option: one-third a cable system (in which all programming is selected and controlled by the system operator), and two-thirds a common carrier video transport system (in which the operator has no control or influence over content selection and

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[1] See 1996 Act, section 302(a) (adding new § 651(a)); NPRM at ¶ 3.

unaffiliated parties may select programming independently and transmit it over the system). Because two-thirds of the OVS system is not cable-like, Congress exempted an OVS from many provisions of the Cable Communications Policy Act of 1984, as amended ("Cable Act").[2]

Thus, under the 1996 Act there is no longer a question as to whether telephone companies will be able to offer video programming. They will. The new question is: how will they do it?

The NPRM as a whole appears to suggest that the Commission believes it must make very loose, or "flexible" OVS rules because OVS must succeed, in order to allow the LECs to compete with the cable industry in the video market. This approach is fundamentally misguided. It reflects the pre-1996 Act assumption that a LEC could not be a cable operator. That assumption is now false. OVS is not the only way for a LEC to compete with cable; it is merely one of four. Thus, OVS must succeed or fail on its own merits as an alternative to the cable model that is distinctively different from that model, not as a replacement for the cable model.

The NPRM misconstrues the type of "flexibility" that the Act gives LECs.[3] Congress encouraged LECs to enter the video distribution field and compete with established cable operators not (as the NPRM suggests at ¶ 6) through lighter, more

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[2] See 1996 Act, Section 302(a), adding new § 653(c)(1).

[3] See NPRM, ¶¶ 2, 12, 13, 15, 31.

"flexible" OVS regulatory burdens, but through the "flexibility" of having four alternative options to enter the market. This means that (1) cable operators should not be allowed to become OVS operators; and (2) OVS is intended to be an alternative distinct from cable, not a cynical vehicle for achieving the perceived benefits of being a cable operator while avoiding the obligations Congress left intact under Title VI. If a LEC chooses to take advantage of the unique privileges of OVS, it may not at the same time be permitted in effect to seize those of a cable operator as well.

Thus, for example, the NPRM quotes the Conference Report to the effect that OVS operators should be allowed great flexibility so that they can "tailor services to meet the unique competitive and consumer needs of individual markets."[4] But the full sentence in the Conference Report makes clear that this "tailoring" is accomplished through the LEC's choice among the four statutory alternatives, not through the single option of OVS.[5] The NPRM is simply wrong in suggesting that the Act sanctions such broad further "flexibility" within the OVS option. If it did, the other three options that Congress made available — especially the cable franchise option — would become meaningless.

The purpose of the OVS rules cannot be simply to give the LECs the "flexibility" to compete with cable operators, since the

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[4] NPRM, ¶ 15.

[5] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 177, 178 (1996) ("Conference Report").

LECs can do that simply by becoming cable operators themselves. Rather, the purpose of the OVS provision must be to give another model a chance: an open, non-discriminatory access system, fundamentally distinct from the closed, proprietary model of cable. In a sense, Congress has set out to see whether an open, nonproprietary scheme can do for video carriage what it did for the personal computer: create a level field on which numerous players may compete.

Congress did not decree that LECs must choose the OVS option; nor did it suggest that OVS was favored over the other three options given LECs. Congress also did not set out to replace the cable franchise model of Title VI with OVS. If Congress had intended to do that, it could simply have deleted Title VI from the Communications Act, rather than widening its scope to include LECs, as the 1996 Act does.

Rather, Congress decided that the market, rather than federal mandate, should determine whether subscribers would prefer OVS to cable. The Commission's role here, then, is merely to ensure that the two video delivery models are distinguished from another — that OVS does not become a cable system in disguise — and to ensure that market forces will then decide which model LECs prefer.

The following sections address four key principles that must guide the Commissioner in formulating OVS rules. First, the Commission must adopt nondiscrimination provisions that prevent an OVS from becoming a cable system in disguise, and instead

ensure that both large and small, and favored and unfavored, programmers will have truly open and affordable access to OVS. Second, the Commission's rules regarding the PEG obligations and other Title VI requirements mandated for OVS by the Act must ensure that OVS operators will meet local community needs and interests; this should be accomplished through a "match or negotiate" PEG requirement for OVS operators. Third, the statute does not permit cable operators to become OVS operators; but even if the Commission should (erroneously) conclude otherwise, a cable operator still cannot become an OVS operator without prior franchising authority consent and approval. Fourth, the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way that will be used by OVS systems; the Commission's OVS certification process must ensure that those property rights are protected by requiring an OVS applicant to demonstrate that it has obtained the necessary local permissions.

II. AN OVS OPERATOR MUST BE SUBJECT TO STRONG NONDISCRIMINATION AND REASONABLE RATE OBLIGATIONS TO PREVENT OVS FROM BECOMING A CABLE SYSTEM IN DISGUISE.

A. The Commission Must Adopt Strong Nondiscrimination Rules.

1. The OVS Model Is Distinct From the Cable Model.

The guiding principle in the Commission's carriage rules for OVS must be that OVS is a distinct option under the Act, fundamentally different from cable. This fundamental difference,

as the name indicates, consists in the open character of the system. Like its predecessor, video dialtone, OVS is intended to provide a genuine opportunity for independent programmers not of the OVS operator's choosing to obtain affordable capacity and compete not only with the OVS, but with the local cable operator as well.

For this arrangement to work, the network must be truly accessible on a fair and practical basis, and not influenced by the OVS operator's preferences. An OVS in which the operator could either select most of the programmers or discriminate among programmers — including discrimination among different unaffiliated programmers — would simply be a classic cable system under another name. Just as a cable operator selects Discovery, ESPN, HBO, Nickelodeon, AMC, and the Family Channel, none (or not all) of which may be affiliated with the cable operator, so an OVS operator allowed to discriminate could select Discovery, ESPN, HBO, Nickelodeon, AMC, and the Family Channel, none of which might be affiliated with the OVS operator, as ostensibly independent programmers on its system, exercising the same degree and kind of editorial control over what the subscriber can receive.

Such a "cable clone" model of OVS would achieve nothing. OVS must be more than merely cable under another name. If Congress had intended the regulatory structure of OVS to replace that of cable, Congress could simply have repealed Title VI and declared every cable system an OVS. But Congress did not do so.

It is evident from the structure of the Act — the four options offered to LECs to provide video service — that OVS is intended to be a regulatory regime substantially different from that of the Cable Act, characterized by open access. Thus, to the extent rules proposed in the NPRM would give OVS operators "flexibility" comparable to that of cable operators, they do not comply with the statutory mandate.

2. The Commission's rules must prohibit discrimination and ensure just and reasonable rates, terms, and conditions.

The language of the statute is unconditional: the Commission's rules must "prohibit an operator of an open video system from discriminating among video programming providers," and must "ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory."[6] The Commission may not merely hope that the unrestrained marketplace will yield fairness and reasonable rates. Rather, the Commission must make rules to ensure that an OVS has these attributes.[7]

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[6] 1996 Act, section 302(a) (adding new § 653(b)(1)(A)) (emphasis added).

[7] The NPRM erroneously appears to read new § 653(b)(1)(B), which states that the one-third capacity limitation shall not be construed to limit the absolute number of channels that the OVS operator may offer to subscribers, as if it reversed the nondiscrimination requirement in subparagraph (A) and permitted the Commission to allow some discrimination by OVS operators. Such an inconsistent interpretation of the statute cannot be countenanced. Rather, the "no limit" provision in subparagraph (B) must be read merely as making clear that the one-third limit is not a numerical limit on the number of channels: if the OVS operator builds additional capacity, its

Moreover, the Commission is not free to devise new interpretations of these terms at will. The key terms — "discrimination," "just and reasonable" — are already in use elsewhere in the Communications Act. The only logical conclusion is that Congress intended these terms of art to be used in the same way in the OVS section, since the OVS terms are not distinguished or redefined in that section.[8] Thus, the OVS provision requires the Commission to achieve the same ends as in Title II, although not necessarily by the same means.

What distinguishes OVS from cable is the carriage requirements for independent programmers that are not editorially selected or influenced by the OVS operator, either directly or indirectly. These obligations must foster new, non-facilities-based competitors on the OVS, or they would be pointless. Independent programmers and program packagers must exercise independent editorial selection, something that will be impossible in practice if the OVS operator is allowed to have any indirect or direct influence over any "unaffiliated" programmer or program packager.[9]

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one-third share expands based on the newly increased capacity.

[8] See, e.g., Johns-Manville Corp. v. U.S., 855 F.2d 1556, cert. denied, 109 S. Ct. 1342 (1988) (where statute defines term, all other unstated meanings are excluded from consideration); American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied sub nom. Connecticut v. FCC, 485 U.S. 959 (1988) (if statutory language is clear, definition should be applied in all circumstances).

[9] We endorse the comments of the Alliance for Community Media, et al., on this issue.

3. OVS carriage obligations must be far stronger, and less carrier-favorable, than cable leased access.

The NPRM appears to suggest that the cable leased access rules might be an appropriate model for the OVS carriage rules.[10] But this suggestion is flatly contradicted by the statute. Even a cursory comparison of new Section 653 and existing Section 612 makes clear that an OVS operator's 2/3 capacity set-aside obligation and its non-discrimination and reasonable rate obligations are far different — and far more exacting — than a cable operator's leased access obligations under Section 612.

Thus, cable leased access is entirely the wrong model to use for OVS, both statutorily and as a matter of policy. Choosing that model would guarantee that OVS would fail as a true vehicle for independent programming. Rather, OVS would become merely cable in sheep's clothing.

Cable leased access has failed as a device for providing meaningful access to programmers unchosen by the cable operator, even though the leased access set-aside requirement is much smaller (in terms of percentage of capacity) than that required under new Section 653. This is because cable operators have been able — both through the delays and costs of the individualized complaint process and through the lack of concrete, cost-based and non-discriminatory rate formulas — to set their barriers to entry high enough that no programmers other than those favored by the cable operators can succeed.

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[10] See, e.g., NPRM, ¶¶ 12, 72.

Absent a substantially different regulatory regime, OVS operators will have every incentive to do the same, because gaining control of all the capacity on the OVS would allow the OVS operator to gain more of the revenues paid by subscribers for program offerings (as on a cable system). Absent strong safeguards, OVS operators will be inclined to discourage independent programmers or, alternatively, enter into discriminatory relationships with favored unaffiliated programmers. Thus, the FCC's OVS rules should assume that any loopholes allowing the OVS operator "flexibility" to "tailor" its system's offerings will defeat the statute's purpose of a truly open system.

4. The Commission cannot rely on competition to restrain OVS operators from discrimination.

Contrary to the NPRM's suggestion (at ¶ 31), the FCC cannot assume that competition in the video delivery market will deter either OVS or cable operators from taking advantage of any such loopholes the FCC may create.[11] As an initial matter, it is not yet clear whether there will be any such competition. While the Act clearly seeks to encourage vigorous competition, the market will determine whether it actually arrives.

However, even if geographically widespread facilities-based competition develops between OVS and cable systems, the result will at best be a duopoly. That is hardly robust competition in

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[11] See NPRM, ¶ 31.

the classic sense, since a two-player market is subject to market distortions and anticompetitive tactics (particularly through signaling and tacit collusion between the duopolists) only slightly less damaging than those typical of a monopoly. Thus, the hope of competition will not permit the Commission to avoid the need to make strong rules that will prophylactically protect against any sort of discrimination.

Indeed, the presence of a cable operator competitor will increase, not decrease, an OVS operator's incentive to discriminate. To compete with the cable operator, the OVS operator will want to behave like a cable operator — to control all capacity on the system, directly or indirectly, picking the programming that it believes (rightly or wrongly) will attract the most subscribers. To this end, a rational OVS operator is likely to use any cable operator-like techniques of discrimination that the Commission's OVS rules permit. For example, an OVS operator may seek to fulfill its 2/3 set-aside obligation with "friendly" unaffiliated programmers. The OVS operator could accomplish this in many indirect and hard-to-detect ways, such as providing attractive financing, promotion or cooperative marketing arrangements only to its favored unaffiliated programmers. Certainly some LECs employed such artifices in efforts to evade the former cable-telco cross-ownership rules,[12] and there is evidence that some cable

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[12] See, e.g., Northwestern Indiana Tel. Co., Inc. v. FCC, 872 F.2d 465 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990).

operators have used similar devices to avoid their leased access obligations.[13]

5. The OVS rules must affirmatively ensure nondiscrimination, rather than waiting for complaints from programmers that have already been harmed.

The complaint-based process suggested in the NPRM at ¶¶ 12-13 will not suffice to protect independent programmers against discrimination. Without clear rules, it is too easy for the OVS operator, controlling all access to the system, to fend off potential programmers through a series of legal proceedings that place an intolerable and inequitable financial burden on the frequently less well-heeled programmers seeking access. This has been thoroughly demonstrated in the cable leased access area. Small independent entrepreneurs in particular will need both certainty and assured, ready access to prosper in the open programming business. Thus, the statute requires the Commission to make rules that will ensure just, reasonable, and non-discriminatory rates, terms and conditions — not just correct injustices after the fact.

B. Specific Rules Must Be Drawn to Prevent Discrimination and Ensure Open Access.

In light of the Act's strong and essential nondiscrimination requirements, many of the NPRM's proposals are misguided. They would impermissibly result in indirect, but nevertheless

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[13] See, e.g., United Broadcasting Corp. v. TCI TKR of South Dade, CSC-366 (filed Apr. 8, 1994).

effective, OVS operator control over most or all programming on the system — in other words, in a cable system.

1. OVS carriage obligations must enable independent programmers to use capacity readily on the OVS.

The Commission must shape specific antidiscriminatory OVS rules to make it possible for independent programmers to compete without depending on the operator's discretion for carriage. The first such rule, clearly, must protect the statutory requirement that 2/3 of system capacity be actually available to independent programmers.

The 2/3 capacity requirement should apply not only to the OVS system as a whole, but also separately to both analog and digital portions, since (at least for the near term) most programmers will not be able to use all modes of transmission.[14] For the same reason, it would be inconsistent with the Act to allocate all analog capacity to one programmer.[15] An OVS must provide nondiscriminatory access, not only to capacity in general, but to specified types of capacity. All programmers, including the OVS operator and its affiliates, must have an equal opportunity to use each type of capacity.

For the same reasons, if the Commission allows an OVS operator to impose limits on the amount of capacity that one independent programmer may occupy,[16] such a limit must not be

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[14] Cf. NPRM ¶ 17.

[15] NPRM, ¶ 21.

[16] NPRM, ¶ 20.

less than the same 1/3 capacity the OVS operator may use, as long as capacity is available. Comparable amounts of channel capacity will be necessary to allow such an independent programmer to compete with the OVS operator itself. Thus, a maximum capacity restriction below 1/3 of the total OVS capacity should be permitted only insofar as excess demand for the 2/3 set-aside capacity requires fair allocation among the competing programmers.

Similarly, channel positioning rules must also be nondiscriminatory.[17] Rules allowing the OVS operator any significant control over channel arrangements would make it too easy for the OVS operator to gain a competitive advantage over disfavored independent programmers — and become too much like a cable operator. The operator could manipulate menus and channel assignments so that viewers "surfing" the channel sequence, or (where applicable) pursuing certain sorts of programming via menu systems, are steered preferentially to the OVS operator's channels.

2. OVS rules must make it easy for programmers to identify and show discrimination by requiring uniform, public carriage rates.

The NPRM is simply wrong in suggesting that the OVS rules should allow for some "discrimination."[18] Such a result would be contrary to the language of the Act (quoted at NPRM ¶ 9). It

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[17] NPRM, ¶ 22.

[18] NPRM ¶ 32.

would permit an OVS operator easily to exclude all truly independent programming by manipulating rates and terms. A common carriage analogy (or related analogies in antitrust or for wholesale transactions under Federal Power Act, Natural Gas Act, or possibly resale arrangements for telephone service) is far more apt than leased access.

The Act's requirement that an OVS operator not "unjustly or unreasonably" discriminate is a direct lift from the common carrier model. As such, it must be read to allow only reasonable differences among reasonable classes of programmers, such as special rates for PEG programmers, or volume discounts based on lower equipment costs for transmission or switching of multiple channels to a subscriber in package form. But such classifications must be open, objective and verifiable, and not based on content. And they may be established only to the extent that the rules encourage truly open access by independent programmers of all sizes and budgets.

New section 653(b) requires the operator to establish reasonable and nondiscriminatory rates.[19] This is not the language of individualized case-by-case contracts. Rather, it implies a common rate structure that must be applied without discrimination to all programmers. But if programmers are to be able to identify discrimination when it occurs, and demonstrate it to gain the necessary relief, the rate structure must also be publicly available in advance.

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[19] NPRM, ¶ 5.

Tariffing (otherwise referred to as rate filing) is the primary means recognized by the Supreme Court through which this problem has been addressed. For example, in Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,[20] the U.S. Supreme Court rejected an Interstate Commerce Commission (ICC) policy that permitted a carrier in bankruptcy to collect negotiated rates lower than its tariff rates, on the grounds that such a policy worked to violate the statutory requirements of nondiscrimination and reasonable rates contained in the Interstate Commerce Act. The Court stated that published tariffs that are charged (with limited exceptions) universally have been considered "essential to preventing price discrimination and stabilizing rates."[21] The Court further endorsed tariffs as an essential component of nondiscriminatory rate-setting for telecommunications providers in MCI Telecommunications v. American Tel. & Tel.:

> The tariff-filing requirement is. . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, ... this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . "[22]

We recognize, of course, that Section 653 provides that OVS operators will not be subject to all of the requirements of Title II. At the same time, however, OVS operators are subject to the same requirement of reasonable and non-discriminatory

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[20] 497 U.S. 116 (1990).

[21] Id. at 126.

[22] 114 S.Ct. 2223, 2231 (1994).

rates as common carriers, and the courts have repeatedly concluded that publicly-posted, uniform rates are the only reliable means of enforcing such a requirement.

We suggest the following way to resolve this conundrum in the Act. OVS operators may be permitted to set their rates without requiring prior Commission approval in the fashion of a tariff, but the OVS operator must make all carriage contracts publicly available.[23] Moreover, the OVS operator must justify any differences in the rates charged for carriage — including the rates charged to its own affiliates or itself[24] — by reference to verifiable and objective factors, such as genuine cost-justified differences (such as volume discounts), and the non-profit nature of the programmer (as with the special status of PEG programmers under the Act). The OVS operator should not, however, be permitted to draw distinctions based on programming content.

For the same reason, the Commission's rules should ensure that all OVS programming contracts contain as a matter of course a "most favored nation" clause, providing that the programmer will automatically receive the benefit of any better deal the OVS operator gives to another similarly-situated programmer. It will still be necessary to publicize contracts, so that differences can be discovered, but such clauses should make it a routine

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[23] NPRM, ¶ 34.

[24] See Amendment of Part 21 of the Commission's Rules With Respect to the 150.8-162 Mc/s Band, Docket No. 16778, Report and Order, 12 F.C.C. 2d 841, 849-50, 852 (1968), recon. denied, 14 F.C.C. 2d 269 (1968), aff'd, Radio Relay v. FCC, 409 F.2d 322, 327 (2d Cir. 1969).

matter to adjust any such differences found. If any carriage contract does not include a most favored nation clause, an explanation should be required from the OVS operator and the Commission should investigate.[25]

Making all contracts public will be one powerful way to ensure real, not merely sham, availability. As long as this requirement applies to everyone (including the OVS operator's own affiliates), no operator or programmer can claim to suffer a competitive disadvantage from such public availability. Any claims that secret "proprietary" contract terms are somehow necessary should be rejected. After all, the LEC can always choose the cable franchise option if it wishes. To the extent that cable operators may be permitted to make secret contracts with programmers, this is a privilege the OVS operator gives up in exchange for the advantages of OVS.

3. The Commission must use either a yardstick or a cost-based approach to determine the reasonableness of rates.

Even eliminating discrimination, however, does not resolve the equally critical problem of determining whether a carriage rate is "reasonable," and effectively auditing the rates an OVS operator would charge to its own affiliates. The Commission should require any programming affiliate of the OVS operator to file standalone financial statements from which the affiliate's rate of return and cash flow can be determined. Repeated losses

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[25] We endorse the comments of the City of Dallas, et al., on this point.

or inadequate rates of return by the OVS operator's programming affiliate would indicate that the OVS operator's carriage rates represent artificially high transfer prices designed to discourage independent, disfavored programmers. Such a reporting requirement might reduce somewhat the need to regulate the OVS operator's carriage rates directly in the traditional sense, by reviewing its ratebase and costs.

But financial disclosures alone would still be insufficient to define the reasonableness of the rates, in the absence of any cost-based rule. If the Commission does not apply a rate-of-return criterion, there must be some "yardstick" test to ensure that there are actually independent programmers on the OVS system, as a check on the reasonableness of rates. We propose that rates will be presumed unreasonable unless (1) at least 1/3 of system capacity is occupied by independent programmers not of the OVS operator's choosing; and (2) at least four such programmers are on the system. This "reality check" would serve as an independent means to ensure that undetected tricks with the financial reports could not be used to exclude independent programmers. These two criteria — multiple entities, together with a percentage of independent channel capacity — are necessary to guard against an OVS operator's using sub rosa "sweetheart" deals to evade the affiliation rules: it would be more difficult to make and conceal such deals with many programmers than with a few.

The only alternative to the stringent yardstick presumption approach we have outlined would be a utility-like, cost-based pricing mechanism to determine whether carriage rates are reasonable and nondiscriminatory as Section 653 requires. And the Act does not preclude the Commission from using such a mechanism. While the Act says that OVS is not subject to Title II obligations,[26] this does not imply that OVS operators are immune from whatever regulatory mechanisms the Commission finds necessary to determine the reasonableness of carriage rates. Otherwise, OVS operators would be free to violate the reasonable rate requirements of Section 653 that form the heart of the entire OVS model.[27]

4. The Commission's rules must prevent OVS operator-programmer relationships outside the carrier-user relationship.

If an OVS is to be a truly open system, OVS rates and terms must encourage both large and small programmers (the well-heeled and those of more limited means) to use the OVS. The Commission's OVS rules must make it as straightforward and easy

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[26] See NPRM, ¶ 30.

[27] The approach outlined above, in contrast, applies only those aspects of a tariff-like process that are specifically required or necessarily implied by the language of the Act: just and reasonable rates (47 U.S.C. § 201(b)), nondiscrimination (47 U.S.C. § 202(a)). It avoids the use of other Title II requirements, such as a duty to expand capacity to serve all comers (§ 201(a)); establishment of rates in absolute terms (§ 201(b)); approval of tariffs prior to service (§ 203); hearings on proposed rates (§ 204); prior approval of construction by the Commission (§ 214); and accounting requirements (§ 220).

as possible for all programmers to obtain OVS capacity. There must be as bright a line as possible to discourage improper behind-the-scenes relationships between the OVS operator and favored non-affiliated programmers. Absent such a bright line, it will be impossible to monitor and enforce whether ostensibly independent programmers have relationships with the OVS operator outside the carriage arrangement.

In the past, the Commission has found only one mechanism able to deal with such artifices. The "carrier-user" restriction in the Commission's former telco-cable cross-ownership rules was designed to deal with many of the same concerns.[28]

We therefore recommend that the Commission's OVS rules should provide that, for a programmer to qualify toward an OVS operator's 2/3 set-aside obligation, the OVS operator's relationship with that programmer should be restricted to a "carrier-user" relationship. The OVS operator should, however, be allowed to perform billing and collection services for such programmers on a non-discriminatory basis.

5. Rules for allocation of OVS capacity must protect independent programming competition.

The NPRM suggests that the OVS operator should be allowed to manage channel allocation, either in general, or when demand exceeds capacity.[29] Clearly, any such control by the OVS operator would be tantamount to the editorial control exercised

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[28] See former 47 C.F.R. § 63.54, Note 1(a).

[29] NPRM ¶¶ 11, 24.

Once the OVS capacity is entirely filled, the best solution to allow new programmers to enter may be rules that ensure an open market in subleasing capacity and free trading of access rights (as against the operator-centric approach of NPRM ¶ 15). Unless the Commission can develop other means to ensure that at least some capacity remains available at all times, it will be essential that OVS channels be assignable, so that programmers can resell their capacity freely, without interference from the OVS operator. In this way a new programmer willing to pay the market price may always in principle be able obtain capacity from existing users. While this rule, without more, may not ensure that affordable capacity is always available for programmers of modest means, it should help to prevent OVS capacity from being locked up once for all. Once again, it is essential to the OVS model that the OVS operator does not have the right to exercise editorial control and hence to monopolize speech on all channels. A LEC that wishes to exert such total editorial control may always choose the cable option.

The NPRM also erroneously seems to assume that switched digital systems will have unlimited capacity.[31] This is not the case. Any switched system has limits on its throughput capacity, switches, input ports, and the like. The public switched telephone network, for example, is a switched network, but it clearly has capacity limits (cf. NXX and other area code issues).

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[31] If the NPRM's assumption were correct, the Commission could simply require that such an OVS carrier provide capacity to all comers, and there would be no problem.

Thus, there is no basis for relieving switched systems from the set-aside obligations that Section 653 requires.

6. OVS program marketing and selection rules must protect access by independent programmers.

The NPRM suggests that the OVS operator may be allowed to market other programmers' channels.[32] This, however, would be indistinguishable from what a cable operator does. For example, when a cable operator carries HBO or TNT, the cable operator is selecting and offering to its subscribers a package of programming put together by other — often unaffiliated — parties. HBO or Turner have chosen the particular programs that run on the HBO and TNT channel feeds, and the cable operator is merely transmitting the programming chosen by its program providers. Thus, if the OVS operator were allowed to market other programmers' products along with its own, this would make it a cable operator.

In addition, it is hard to imagine how an independent programmer could compete with the OVS operator if the OVS operator could bundle the independent's programming in with its own products, but not vice versa. In effect, the OVS operator would be able to offer all the channels on its system to subscribers — not just 1/3 — while the independent could only offer its own channels. Such an arrangement would doom intra-system competition, not promote it.

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[32] NPRM ¶¶ 10, 27.

Similarly, the NPRM suggests that the OVS operator may choose what programming is carried on shared channels, or select another entity to do so.[33] Either notion would result in impermissible editorial control by the OVS operator and potential discrimination against independent programmers. If the OVS operator could determine which channels could be shared, it would gain considerable control over all programmers' packaging decisions. To allow the OVS operator to select another entity to do so would merely permit an OVS operator to do indirectly, through an agent, what it should not be allowed to do directly. A simpler solution would be to require the OVS operator to carry on only one physical channel any program feed requested by two or more OVS programmers, and to make that channel accessible to all of those programmers' subscribers. If the OVS operator itself wants to carry the shared channel, it must negotiate with the program providers in exactly the same way as do the OVS program packagers.[34]

It must be kept in mind that precluding OVS operators from exercising any influence over program selection on the two-thirds of system capacity set aside for others on OVS is consistent with the First Amendment. After all, any would-be OVS operator that wishes to select all the programming itself always has the option under the Act of being a cable operator instead if it wishes.

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[33] NPRM, ¶ 37.

[34] See NPRM, ¶ 41 (each video provider must deal with program vendors independently).

7. OVS programmer application and usage rules must protect independent programming competition.

Financial Conditions. The Commission should resist any suggestion that potential programmers demonstrate financial resources or meet other artificial hurdles, which would simply deter competition. Rather, the Commission should specify a maximum financial commitment for programmers that would not form a barrier to entry for competing independent programmers — for example, one month's carriage fees in advance as a deposit, to be returned on termination.

Parity With Affiliates. It is difficult to know what to make of the NPRM's question whether an OVS operator should be allowed to charge independent programmers higher rates than it charges its own affiliates.[35] We think it should be obvious that the OVS operator and its affiliates can get no better deal than other programmers. If nondiscrimination means anything, it must mean this.

Minimum Channel Requirements. If the OVS operator could set minimum requirements — for example, refuse to make available less than five channels to a programmer — it would be simple for the OVS operator to eliminate small or niche-market programmers from competition for its capacity. Thus, the OVS operator should be

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[35] NPRM, ¶ 31.

required to make single channels and partial (part-time) channels available, to accommodate those of limited means.[36]

C. An OVS Operator That Violates the Commission's OVS Rules Should Be Required to Obtain a Cable Franchise.

If an OVS operator is found to be in violation of the OVS rules, it should be decertified and required to obtain cable franchises for the relevant areas. This remedy would ensure that the operator could stay in business as a video competitor, but would deprive it of the special OVS privileges it had abused. In cases where the violation does not fall clearly within the Commission's rules, the Commission may wish to provide the OVS operator with notice and sixty days' opportunity to cure before decertification.

III. OPEN VIDEO SYSTEMS MUST MEET LOCAL COMMUNITY NEEDS AND INTERESTS.

The Act requires the Commission to make rules that will impose on an OVS obligations no greater or less than those contained in sections 611, 614, and 615 of the Cable Act and section 325 of the Communications Act (PEG access, must-carry and retransmission consent). The following comments address this

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[36] The Commission recently recognized that cable operators must make part-time arrangements available to leased access programmers. See Public Notice, Commission Adopts Order And Further Notice of Proposed Rulemaking Regarding Rules for Cable Television Leased Commercial Access, at 2 (March 21, 1996). Obviously, OVS operators should be subject to no lesser standard than cable operators.